STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 12, 2005
v	No. 254006 Wayne Circuit Court
TYREE STINSON, Defendant-Appellant.	LC No. 03-011635-01

Before: Whitbeck, CJ, and Zahra and Owens, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] He was sentenced to a prison term of 14½ to 25 years for the murder conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I. Underlying Facts

Defendant's convictions arise from allegations that, in the early morning of August 31, 2003, he fatally shot the victim, who was his estranged wife's boyfriend. At the time of the shooting, defendant and Tenisha Tigner had been separated for eight months, but she and their four children lived in defendant's mother's house. Tigner testified that, on the day of the incident, she was having a female entertainment party for male guests. Defendant testified that he was at the house to provide security. According to Tigner, the victim called her and, at approximately 3:00 a.m., unexpectedly came to the house. Tigner allowed the victim to come into the house to use the bathroom.

Tigner testified that, after returning outside, the victim asked her to leave with him and, when she refused, the victim assaulted her. At the time, defendant was standing on the porch, approximately twenty-five feet away. According to defendant and Tigner, defendant told the victim to leave and directed Tigner to go into the house. Deonte Grimes, defendant's cousin, testified that, by this time, he was on the porch and heard defendant tell the victim that Tigner was not leaving. Thereafter, Tigner went into the house. According to Grimes, the victim then

[1] Defendant was acquitted of first-degree premeditated murder, MCL 750.316.

walked to his car, started it, and began to leave. Grimes testified that defendant retrieved a rifle, pointed it at the victim's car, and shot at least twice while leaving the porch and advancing toward the car in between shots. Grimes did not see any weapon in the victim's hands, and indicated that the car was "trying to reverse."

Police witnesses testified that, when they arrived, the victim's car was still running, in gear, and was "locked up on a curb." The "wheels were cut as though [the victim] was trying to back up." Several bullet holes were in the victim's car, no weapon was found, and there was no evidence that any shots were fired from inside the victim's car.

Defendant testified on his own behalf. He claimed that the victim had assaulted Tigner and, after she went into the house, he had to stop the victim from entering the house. Defendant claimed that, as the victim was walking to his car, he made several threats and reached inside his car as if he was retrieving something. At that point, defendant retrieved his rifle from inside the doorway and shot in the air. Defendant claimed that, after the victim got into his car, he thought he saw the flash of a weapon and returned fire. Defendant denied ever leaving the porch. Both Tigner and defendant claimed that, on the day before the incident, the victim had acted menacingly and had fired a weapon in the air.

II. Imperfect Self-Defense

Defendant first contends that this Court should apply the doctrine of imperfect self-defense to his circumstances, where he allegedly acted with an unreasonable belief of imminent danger or reacted with an unreasonable amount of force, and reduce his conviction to manslaughter. We disagree.

Because defendant did not raise this claim below, this Court reviews this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Imperfect self-defense has been applied in other jurisdictions "where a defense of self-defense fails because the defendant was the aggressor, or maintained an unreasonable belief of danger, or reacted with an unreasonable amount of force." *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985), abrogated in part on other grounds in *People v Heflin*, 434 Mich 482, 503 n 16; 456 NW2d 10 (1990). Our Supreme Court has not recognized imperfect self-defense as a viable defense in Michigan. *People v Posey*, 459 Mich 960; 590 NW2d 577 (1999). However, panels of this Court have applied the doctrine only where a defendant would have had the right to self-defense but for his actions as the initial aggressor. See *People v Kemp*, 202 Mich App 318, 324; 508 NW2d 184 (1993), and *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). Thus, the doctrine of imperfect self-defense is inapplicable to this case. Further, we decline defendant's request to extend the doctrine of imperfect self-defense to his alleged circumstances because "[a]pplication of the defense to these facts would be a significant extension of prior case law and is more appropriately a matter for legislation, court rule, or appeal to the Supreme Court." *Deason, supra* at 32. Consequently, this claim does not warrant appellate relief.

III. Sufficiency of the Evidence

We reject defendant's claim that the evidence was insufficient to support his conviction for second-degree murder.

"This Court reviews a challenge to the sufficiency of the evidence at a bench trial by viewing the evidence presented in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *Kemp, supra* at 322, citing *People v Patrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996), citing *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

The elements of second-degree murder are "'(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.'" *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001), quoting *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Defendant essentially challenges the trier of fact's conclusion that he acted with malice and without justification. "'Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.'" *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004), quoting *Goecke, supra* at 464.

Evidence was presented that defendant shot the victim multiple times with a rifle after the victim was inside his car, leaving the premises. Defendant does not dispute the police witnesses' testimony that the victim's car was running and in gear, that no shots were fired from inside the victim's car, and that no firearm was found in or around the victim's car. There was also evidence that, as defendant was shooting at the victim, he left his porch and walked closer to the victim's car. From this evidence, viewed in a light most favorable to the prosecution, a rational trier of fact could reasonably infer that defendant acted with malice and without justification. Defendant claims that the evidence was insufficient to establish malice because he believed that the victim was going to harm Tigner. But it is undisputed that, when defendant retrieved his weapon and shot the victim multiple times, Tigner was already in the house. Moreover, the trial court, as the trier of fact, concluded that Tigner's testimony that the victim had acted menacingly was slanted to aid defendant, and that both defendant's and Tigner's testimony lacked credibility. The trier of fact was entitled to accept or reject any of the evidence presented, *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999), and this Court will not interfere with the trier of fact's determination of the weight of the evidence or the credibility of the witnesses, *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence was sufficient to sustain defendant's conviction of second-degree murder.

IV. Sentence

In his final claim, defendant contends that the factual findings supporting his score of fifteen points for offense variable 5, MCL 777.35 (serious psychological injury to a victim's family, requiring professional treatment), were not determined by a jury, as mandated by *Blakely v Washington*, 542 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and, therefore, he must be resentenced. In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the

jury's verdict or admitted by the defendant. But our Supreme Court has stated that the holding in *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Consequently, defendant's argument is without merit.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Donald S. Owens